UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Elementis Chromium, Inc.,	)	**Docket No. TSCA-HQ-2010-5022**
f/k/a Elementis Chromium, L.P.	)	
	)	
Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION FOR INTERLOCUTORY APPEAL

An Order on Respondent's Motion for Judgment on the Pleadings was issued in this matter on March 25, 2011 ("Order"). In that Order, the undersigned found to be "continuing" the requirement set forth in section 8(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2607(e), that chemical manufacturers "immediately inform the Administrator [of EPA]" of "information [obtained] which reasonably supports the conclusion that [a] substance or mixture presents a substantial risk of injury to health or the environment." As such, it was held that the instant action instituted by EPA on September 2, 2010, against Respondent for its alleged failure to disclose information it obtained on October 8, 2002, was not barred by the applicable five-year statute of limitations set forth in 28 U.S.C. § 2462.

On April 11, 2011, Respondent's Motion Requesting the Presiding Officer to Recommend Interlocutory Review of the March 25, 2011 Order by the Environmental Appeals Board ("Motion") was filed. Complainant submitted its Response in opposition to the Motion on April 14, 2011 ("Response").

The regulations governing this proceeding, set forth at 40 C.F.R. Part 22 and entitled the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), provide that an order or ruling may be recommended for interlocutory review by the Environmental Appeals Board ("EAB") when:

> (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and
>
> (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

40 C.F.R. § 22.29(b).

Respondent argues in its Motion for interlocutory review of the Order that the holding therein "wholly undercuts the purpose of the statute of limitations" and "disregards the precedential holdings of the United States Supreme Court concerning 'continuing violations' in *Toussie v. United States,* 397 U.S. 112 (1970), the [D.C.] Circuit concerning the impact of EPA's

ability to discover violations in *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Circuit 1994), and the consideration by the [EAB] of analogous factual circumstances in *In re Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997)." Motion at 2. Respondent further argues that the holding "is contrary to any reasonable interpretation of [the term] 'immediately,' after which the limitations period begins to run," and is inconsistent with "EPA's own guidance that TSCA § 8(e) information must be provided to the agency within 30 days." *Id.* "Whether a violation under TSCA § 8(e) is continuing in nature is an important legal question of general applicability and the significant differences of opinion and interpretations are demonstrated in the March 25, 2011 Order," Respondent proclaims, and consideration of this dispositive issue by the EAB will promote judicial economy and materially advance the ultimate termination of the proceeding. Motion at 3.

In its Response, Complainant asserts that the Order is "wholly consistent with the existing case law" of the D.C. Circuit and the EAB and that Respondent has failed to demonstrate that there are substantial grounds for difference of opinion. Response at 2. "[G]iven the clarity of the law," EPA claims, granting the interlocutory appeal "will not advance the ultimate resolution of the proceeding, but will serve instead only to delay that resolution." Response at 3. In support thereof, it also cites the D.C. Circuit's holding in *3M* that the general five-year statute of limitations is applicable to TSCA penalty enforcement actions, the EAB's decision in *Lazarus*, and various other EAB decisions, including *In re Harmon Elec., Inc.*, 7 E.A.D. 1, 22 (EAB 1977), *rev'd on other grounds*, *Harmon Indus., Inc. v. EPA*, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999), and *In re Newell Recycling Co.*, 8 E.A.D. 598, 614 (EAB 1999), *aff'd, Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204 (5th Cir. 2000).

There can be no question that the holding of the Order that TSCA § 8(e)'s disclosure requirement is "continuing in nature" involves "an important question of law and policy." Statutes of limitations implement an important public policy through a broadly applicable rule of law to preclude recovery in otherwise valid actions merely due to the passage of time. *Newell Recycling*, 8 E.A.D. at 614. And, as acknowledged in the Order, holding a certain requirement to be "continuing" represents a recognized exception which by its very existence as such undercuts the full expression of such policy and rule of law. Order at 6 (citing *Lazarus*, 7 E.A.D. at 364). It is also clear that the parties differ in their opinions as to what the correct ruling on such an important question should be. However, those points alone do not justify interlocutory review. To warrant interlocutory review, Respondent must also show that there is "substantial grounds" for the difference of opinion. Upon review, it is concluded that Respondent has failed to make such a showing in this case.

First, none of the case authorities to which Respondent cites in its Motion specifically holds that the disclosure obligation under TSCA § 8(e), or a similar provision, is not continuing in nature, and thus none directly contradict the holding of the Order. Second, the Order did not "disregard" what Respondent characterizes as the "precedential holdings" by the Supreme Court in *Toussie*, the D.C. Circuit in *3M*, and the EAB in *Lazarus,* but to the contrary addressed each of those holdings, and others by the EAB, and applied them to the extent applicable. Order at 5-6. The Order also specifically addressed the significance of the term "immediately" and EPA's guidance, citing to ample case authority in support of its conclusion that neither controls whether TSCA § 8(e) disclosure provision is continuing, and Respondent has not cited any authority in contradiction of this conclusion. Order at 7-8. As such, it appears that what the holding of the Order "disregards" is not any controlling or persuasive authority but merely Respondent's desire for a ruling consistent with its view of the issue. Accordingly, Complainant's point is well taken that Respondent has failed to satisfy the criteria for interlocutory review.

Respondent having failed to meet the first criterion for interlocutory appeal under 40 C.F.R. § 22.29(b)(1), it is not necessary to address the second criterion that "[e]ither an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective." Nevertheless, it is noted that resolution of this proceeding, which involves the issue of the 2002 non-disclosure of information, has been pending for almost seven months without the pre-hearing exchange procedure having even begun. If interlocutory review was granted, the proceeding would be significantly further delayed. Further, if, as expected, Complainant prevailed before the EAB on the interlocutory appeal, however long that would take, a hearing then on remand to conclude this matter could not be scheduled until many months thereafter, with the intervening time creating the additional potential loss of witnesses and relevant documents, and the inevitable fading of witnesses' memories.

Accordingly, Respondent's Motion for Interlocutory Appeal is hereby **DENIED.**

Susan L. Biro
Chief Administrative Law Judge

Dated: April 27, 2011
Washington, D.C.

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CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Respondent's Motion for Interlocutory Appeal**, dated April 27, 2011 following manner to the addresses listed below.

Sybil Anderson
Headquarters Hearing Clerk

Dated: **April 27, 2011**

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